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No. 84-1239

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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MARGARET YOUNG, PETITIONER

*v.*

JOHN LEHMAN, JR., SECRETARY OF THE NAVY

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT IN OPPOSITION**

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES


Page

Cases:

*Anderson* v. *City of Bessemer City*, No. 83-1623 (Mar. 19, 1985) ..... 4, 6, 7

*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 ..... 5, 7

*Pullman Standard Co.* v. *Swint*, 456 U.S. 273 ..... 4

*Taylor* v. *Jones*, 653 F.2d 1193 ..... 5

*Teamsters* v. *United States*, 431 U.S. 324 ..... 7

*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 ..... 5, 7

*United States* v. *United States Gypsum Co.*, 333 U.S. 364 ..... 4

*Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985) ..... 5, 6

Statute and rules:

Civil Rights Act of 1964, Tit. VII, § 717, 42 U.S.C. 2000e-16 ..... 1

Fed. R. Civ. P. :

Rule 52 ..... 4

Rule 52(a) ..... 6

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Petitioner seeks review of the court of appeals' holding that she was not discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, § 717, 42 U.S.C. 2000e-16.

1. Petitioner, a black female, applied for the position of Supervisory Personnel Management Specialist with the Navy Ship Engineering Center (NAVSEC). Six other individuals, including Christopher Iekel, a white male, also applied for this advertised vacancy; Iekel was detailed to the position on a temporary basis. Pet. App. 3a.

The selection panel convened to fill the vacancy, reviewed the applications, interviewed the applicants, and rated them according to specific job-related criteria. The panel gave petitioner and another applicant a "best qualified" rating, while Iekel and one other applicant were listed as "highly qualified." The panel then delivered the recommendations

favoring petitioner and the rating sheets of the panel members to a Navy personnel specialist who was involved in supervising the selection process. Pet. App. 4a-7a.

Upon reviewing the recommendations and rating sheets returned by the panel, the personnel specialist discovered the notation "My guess she's black" on a rating sheet dealing with an applicant other than petitioner or Iekel, which had been completed by the panel chairman (himself a black). On the basis of this notation and her view that the panel had not accorded proper weight to the relevant criteria, the personnel specialist recommended that the panel's recommendations be rejected, and that a second panel be convened. The rating sheets were also reviewed by an EEO official, who concluded that the chairman's notation constituted evidence of improper racial consideration sufficient to warrant the formation of a new panel. The personnel specialist and the EEO official reported their findings to the Personnel Director, who rejected the panel's recommendation and ordered the creation of a new panel; the Command Deputy EEO Officer concurred in this decision. Pet. App. 7a-8a.

The second panel used the same criteria as its predecessor. It ranked Iekel "highly qualified" and recommended him for the position. Petitioner was ranked sixth out of eight applicants. Iekel was given the appointment after the personnel specialist and the EEO official went over the second panel's rating sheets and discovered no evidence of impropriety. Pet. App. 8a-9a.

Petitioner thereafter filed an EEO complaint. Pet. App. 30a. After unsuccessfully exhausting her administrative remedies, she commenced this Title VII action in the district court, alleging that she had been discriminated against on the basis of her race. After a trial, the district court determined that petitioner had established a prima facie case of

discrimination, and that the Navy's proffered nondiscriminatory reasons for petitioner's nonselection—*i.e.*, the racial taint associated with the first panel's decision and Iekel's superior qualifications—were "unworthy of credence." Pet. App. 30a-32a. The court so held even though it had stated, in the course of the trial, that "there is no question but what the book on [petitioner] was that she wasn't the most qualified person in the world," and that "I believe [Iekel] is actually better qualified." Pet. App. 17a-18a n.4. The court did not even mention the racial notation in its findings or conclusions.

The government appealed, and the Fourth Circuit reversed. The court of appeals held that petitioner had established a prima facie case, but that she had failed to carry her burden of demonstrating the Navy's proffered reasons for her nonselection to be pretextual. Pet. App. 10a. The court stated that the racial notation "was an adequate basis to dissolve the first panel and convene a new one," especially since the Navy personnel officials only took this step "after Mrs. Jones, the EEO official, insisted that the panel's process was tainted by this racial comment." *Id.* at 14a-15a. The court further declared that the Navy's contention that Iekel was better qualified than petitioner "was a properly articulated reason which was not shown by [petitioner] to be pretextual." *Id.* at 16a. The court noted that "the record indicates that Iekel worked for a longer period in positions emphasizing classification and staffing—the criteria weighted most heavily by both panels," and that Iekel—unlike petitioner—had received several awards and commendations, as well as consistently above average performance appraisals. *Id.* at 16a-17a. Accordingly, the court of appeals held that petitioner had failed to rebut the Navy's showing of legitimate nondiscriminatory reasons for her nonselection.

2. The decision of the court of appeals is correct and does not conflict with any decisions of this Court or any other court of appeals. Thus, further review by this Court is not warranted.

Petitioner contends that the court of appeals engaged in "appellate factfinding" (Pet. 7, 9), contrary to Rule 52, Fed. R. Civ. P., and this Court's decision in *Pullman Standard Co.* v. *Swint,* 456 U.S. 273 (1982). See also *Anderson* v. *City of Bessemer City,* No. 83-1623 (Mar. 19, 1985). The court of appeals, however, plainly determined that the district court's decision was "clearly erroneous," albeit without using that specific phrase.[1]

In *Pullman,* this Court held that the district court's determination with respect to the "ultimate fact" of intentional discrimination is subject to review under the "clearly erroneous" standard of Rule 52. 456 U.S. at 286-288. The Court further stated that "[a] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 456 U.S. at 284-285 n.14, citing *United States* v. *United States Gypsum Co.,* 333 U.S. 364, 395 (1948). Accord, *Anderson,* slip op. 7-8. Examination of the court of appeals' opinion leads inescapably to the conclusion that the court was left with just such a "definite and firm conviction."

The Fourth Circuit's conviction of error derived chiefly from two sources: (1) the racial notation calling into question the first panel's selection process, which the district court had completely ignored in its recitation of the facts,

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[1]Nothing in *Anderson* v. *City of Bessemer City, supra,* this Court's most recent pronouncement on this subject, suggests that an appellate court may correct a trial court's manifest error in finding facts only if it invokes talismanically that specific phrase.

even though that notation had prompted an EEO official to insist on the formation of a new panel; and (2) the fact that the district court itself stated that Iekel's qualifications were superior to those of petitioner. Under these circumstances, the court of appeals properly determined that petitioner had not carried her burden of demonstrating that the Navy's proffered reasons for not promoting her were pretextual. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). Thus there is no occasion here to review this case in order to recall an errant court of appeals to a proper conception of its responsibilities, and this particular fact-bound determination clearly does not of itself warrant review by this Court.[2]

Petitioner's reliance on this Court's recent decision in *Wainwright* v. *Witt*, No. 83-1427 (Jan. 21, 1985), is misplaced. Contrary to petitioner's assertion, this case—unlike *Witt*—does not "turn[ ] largely on the demeanor and credibility" of witnesses (Pet. 9). Rather, the court of appeals found the district court's error to consist of its decision to ignore objectively demonstrable record evidence, *i.e.*, the racial comment and Iekel's superior credentials; indeed, the clearly erroneous character of the district court's decision is demonstrated by the fact that the court itself recognized that Iekel's qualifications were superior to those of petitioner (Pet. App. 17a-18a n.4), but nonetheless held that

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[2]Moreover, it is apparent that the officials involved in this case could not blind themselves to evidence of racial consideration by an employment panel and still remain faithful to Title VII's policy of "fair and racially neutral employment and personnel decisions." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973). The district court thus clearly erred in disregarding the Navy's obligation not to permit racial considerations to taint the panel's decisionmaking process, particularly since "[e]mployer toleration of a discriminatory atmosphere alone gives rise to a cause of action by the plaintiff." *Taylor* v. *Jones*, 653 F.2d 1193, 1199 (1981).

petitioner had satisfied her burden of proving pretext.[3] These flaws manifestly do not turn upon witness demeanor and credibility. Thus, *Witt* is completely inapposite.

Nor is this a case, like *Anderson* v. *City of Bessemer City, supra,* in which the record would plausibly support either the conclusion of the district court or the court of appeals (see *Anderson,* slip op. 11-12). Instead, as the court of appeals pointed out, there is here "no evidence of improper racial motivation in forming the second panel. * * * In any event, the disbanding of the first panel and the selection of the second panel were, at most, mediate procedures * * * insulated from a Title VII attack" (Pet. App. 15a).

In sum, petitioner's arguments could find support in *Anderson* only if one disregarded Justice Powell's warning in his concurrence in that case (slip op. 1):

> I am concerned that one may read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion, rather than to undertake the type of burdensome review that may be appropriate in some cases.

Petitioner in effect urges here precisely such a conclusory application of Rule 52(a).

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[3]This recognition of Iekel's superior qualifications also sharply distinguishes this case from *Anderson* v. *City of Bessemer City, supra,* in which this Court criticized the court of appeals for substituting its judgment for that of the district court concerning the ranking of the candidates (slip op. 10-12). Indeed, in addition to the district court's comments reported at Pet. App. 17a-18a n.4, there is the conspicuous absence from the district court's findings of any comparison of the qualifications of petitioner and Iekel (Pet. App. 20a-33a). Cf. *Anderson,* slip op. 3.

Finally, petitioner contends (Pet. 12-14) that this case presents the issue of whether a Title VII plaintiff must prove that he or she is better qualified than the successful applicant; petitioner argues that such a requirement "would effectively repeal Title VII for the substantial number of positions in the United States labor market for which all of the qualified applicants are essentially equally qualified" (Pet. App. 14). Whatever the merit of petitioner's position, this case does not present that issue. Here, both the court of appeals and the district court recognized that petitioner was not as well qualified as the successful applicant.[4] This case therefore does not involve the latitude of the employer to choose among "essentially equally qualified" applicants, and the question raised by petitioner is not before this Court.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

MARCH 1985

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[4]It is clear from this Court's decisions that an applicant must demonstrate at a minimum that he was not rejected because of a "relative lack of qualifications." *Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977); see also *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 259; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802.

[5]Nor, contrary to petitioner's suggestion, was that issue properly presented in *Anderson*, where the district court held that Anderson had superior qualifications, and the court of appeals believed that the candidate selected was better qualified (see slip op. 10-12). Accordingly, it is not surprising that this Court did not address in *Anderson* the situation in which two candidates are equally qualified.